FORBEARANCE TO SUE.

IS forbearance to sue upon an unenforceable cause of action a sufficient consideration for a promise? Many respectable authorities declare that it is not; and such is generally the language of text-books on this subject. See also Davisson *v.* Ford,[1] Long *v.* Towl,[2] and Harris *v.* Cassady,[3] for general statements of the same doctrine. One of the strongest cases on this side of the question is Palfrey *v.* Portland, Saco, & Portsmouth R. R. Co.[4] The plaintiff's husband, an employee of the defendant, was killed while on duty, through the defendant's negligence. The defendant, "in consideration of the premises and of her forbearance to sue it," promised to pay the widow fifty dollars a month during her life, which it did for several years, and then discontinued payment. In a suit by her on such contract (not in tort as the report states), it was held she could not recover; because, the death of her husband being no foundation for an action for damages,[5] she could not have recovered in her forborne suit, and therefore the defendant's promise was "without consideration and void"; citing Tooley *v.* Windham,[6] and Hammon *v.* Roll.[7]

In Dunham *v.* Johnson,[8] Allen, J., says, "Whether forbearance to prosecute a groundless claim is sufficient consideration for a promise to pay money, or under what circumstances forbearance to sue a doubtful or contested demand will be sufficient, it is not necessary to consider," and Palfrey's case is cited, without comment.

In Hammon *v.* Roll, *supra*, C held the joint and several bond of A and B, and released A therefrom. Afterwards B, in consideration that C would forbear the collection of said bond till a certain day, promised to pay it at that time; but in assumpsit upon such promise it was held that, as the bond was entirely discharged by the release to A, there was no longer a debt which could be recovered of B, and the promise to forbear was no consideration for B's new promise to pay. See Herring *v.* Dorell.[9]

In Loyd *v.* Lee,[10] forbearance to sue a note given by a married

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[1] 23 W. Va. 617.
[2] 42 Mo. 545.
[3] 107 Ind. 158.
[4] 4 Allen, 55 (1862).
[5] 1 Cush. 475.
[6] Cro. Eliz. 206; 2 Leon. 105.
[7] March, 202.
[8] 135 Mass. 313.
[9] 8 Dowl. Pr. C. 604 (1840).
[10] 1 Str. 94.

woman was held, at Nisi Prius, not to be a good consideration for her promise to pay, made when sole; since the note was absolutely void in the first instance.

In Mulholland *v.* Bartlett,[1] the defendant was threatened with a suit upon a claim against a firm in which he was not a partner, and for which he was in no way liable. He gave the plaintiff a written agreement to pay the claim "to avoid the trouble and annoyance of defending myself at law, from being made liable as a partner in said firm." This was held not binding for want of consideration. And see Bates *v.* Sandy.[2]

Jones *v.* Ashburnham,[3] sometimes cited on this side of the question, turned really upon the fact that, although the plaintiff had a just and valid claim due from a deceased person, yet at the time he promised to forbear suing on it no administrator or representative of such person had been appointed who could be sued, and therefore there could be no forbearance to sue when no suit could even be brought, and so the promise of the defendant to pay the debt in consideration of a promise to forbear was without consideration. Rosyer *v.* Langdale[4] is much like it. See Schroeder *v.* Fink,[5] and Nelson *v.* Serle,[6] which may well rest on the same ground.

Of course, if a plaintiff "well knew" or really believed he had no cause of action, he could not recover for forbearing to sue upon it, as that would be a gross fraud, and merely blackmail. Wade *v.* Simeon;[7] Ormsbee *v.* Howe;[8] *Ex parte* Banner;[9] Headley *v.* Hackley.[10]

Perhaps the same rule would apply in a somewhat less degree, if the plaintiff had not the slightest reason to believe he had a good cause of action.

On the other hand, reason and analogy seem to suggest, and the more modern authorities hold, that, if a meritorious claim is made in good faith, a forbearance to prosecute it may be a good consideration for a promise, although on the facts or on the law the suit would have failed of success.

In McKinley *v.* Watkins,[11] it was held that a forbearance to sue by one who erroneously but honestly supposes he has a good cause of action is a good consideration for a promise. And see Miller *v.* Hawkes.[12]

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[1] 74 Ill. 58 (1874).
[2] 27 Ill. App. 552 (1888).
[3] 4 East, 455 (1804).
[4] Style, 248.
[5] 60 Md. 436.
[6] 4 M. & W. 795.
[7] 2 C. B. 548.
[8] 54 Vt. 182.
[9] 17 Ch. D. 480.
[10] 50 Mich. 43.
[11] 11 Ill. 140 (1851).
[12] 66 Ill. 185 (1872).

In Cook *v.* Wright,[1] the defendant was agent for a Mrs. Bennett, the owner of certain houses in front of which paving work had been done by the plaintiffs, as trustees of the parish, under the Whitechapel Improvement Act of 1853, to the amount of seventy pounds, for which the "owner" was liable by the act. The defendant was tenant of one of the houses, and the trustees contended that he was an owner thereof under the act, and threatened to sue him, unless he gave his notes for thirty pounds, to which the claim was reduced. Thereupon he requested time, which was given him, and he gave his own notes for thirty pounds, on time, the first of which was paid. "At the trial, it appeared that he was not the owner of the houses, and was not personally liable under the act, and that in point of law the plaintiffs were not entitled to claim the money from him though they honestly believed that the was personally liable and intended to take legal proceedings against him for the amount." It also appeared that the defendant did not believe he was liable, and gave the notes solely to avoid being sued. After full argument in the Queen's Bench, it was held that the notes were on good consideration, being given "in order to avoid the expense and trouble of legal proceedings against himself"; Blackburn, J., saying, "If the suit had been actually commenced the point would have been concluded by authority." But that fact was held immaterial, the same judge saying, "It is detriment to the party consenting to a compromise arising from the necessary alteration in his position which in our opinion forms the real consideration for the promise, and not the technical and almost illusory consideration arising from the extra costs of litigation." Cockburn, C. J., and Wightman, J., concurred. Here there was indeed a legal cause of action against Mrs. Bennett, the owner, but there was none against the defendant personally, and he did not believe there was, and his own notes were given solely to avoid a suit against himself.

In Callisher *v.* Bischoffsheim,[2] the plaintiff, believing that a certain sum was due him from the government of Honduras, was about to take legal proceedings against said government to collect the same; whereupon the defendant, "in consideration that the plaintiff would forbear from taking such proceedings for an agreed time, promised to deliver to the plaintiff certain securities, called Honduras Railway Loan Bonds, to the amount of six hundred pounds," etc. In a suit for a breach of this promise, it was admitted (by a

[1] 1 B. & S. 559 (1861).

[2] L. R. 5 Q. B. 449 (1870).

demurrer) that "no money was due the plaintiff from the Honduras government," but it was held that the forbearance, notwithstanding, was a good consideration for the promise; Cockburn, C. J., saying, "When a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations incident to it." Blackburn, Mellor, and Lush, JJ., concurred. Judgment for the plaintiff. In this case the plaintiff had no legal cause of action against *any one*, which is still stronger than Cook *v.* Wright. The same principle was approved and acted upon in Rue *v.* Meirs.[1]

In Ockford *v.* Barelli,[2] the plaintiff had married the defendants' father while his first wife was still living, though supposed to be dead. Upon the subsequent death of her *de facto* husband, she made a claim, as widow, for a third of his estate, believing that she was lawfully entitled to it. Thereupon the defendants, heirs to the estate, gave her the following agreement: "In consideration of your abstaining from making, and forbearing to make, any claim against our late father's estate, we hereby respectively undertake to pay you over one third of the net value and proceeds of the estate up to the time of his decease." Upon the authority of Callisher *v.* Bischoffsheim, the forbearance was held a good consideration for the promise, after a full argument and citation of the authorities by the Court of Exchequer. It is not easy to reconcile this case with Palfrey's case, before cited.

In Miles *v.* New Zealand Alford Estate Co.,[3] the cases of Cook *v.* Wright, Callisher *v.* Bischoffsheim, and Ockford *v.* Barelli, were distinctly approved in separate judgments by Cotton, L. J. (p. 282), by Bowen, L. J. (p. 291), and by Fry, L. J. (p. 297); and the doctrine is declared that a *bona fide* compromise of a real claim is a good consideration, whether the claim would have been successful or not.

If a creditor honestly, though erroneously, supposing his claim is not yet barred by the Statute of Limitations, proposes to sue it and the debtor writes him, "Your claim is too old, but it will cost me fifty dollars to defend a suit, and if you will forbear to bring suit, I will pay you twenty-five dollars for such forbearance," and the creditor does so, can he not recover the twenty-five dollars?

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[1] 43 N. J. Eq. 377 (1887).

[2] 25 L. T. Rep. 504 (1871); 20 W. R. 116.

[3] 32 Ch. D. 269 (1886).

In Hewett *v.* Currier,[1] it was held that forbearance by a *sub-contractor* to file a claim for a lien, to which he supposed himself entitled upon a building for which he had furnished materials, is a sufficient consideration for a promise by the owner to pay the amount due, though it afterwards appears that such sub-contractor was not entitled to a lien. And see Young *v.* French,[2] and Fish *v.* Thomas.[3]

In Bellows *v.* Towles,[4] it was held that, if A honestly believes that he has good and reasonable ground to oppose the probate of a will on the ground of undue influence, a promise to pay him five thousand dollars if he will not make such opposition is binding, whether there was or was not any valid ground for opposing the will.

This view brings the doctrine of "forbearance without suit" into harmony with that of a "compromise of an existing suit," which it so much resembles. For it is well settled that a promise to pay part of a claim by way of compromise of a pending suit is binding, even though the suit was not well founded, and the plaintiff therein would not have succeeded. In other words, the validity of the original claim, either in fact or in law, cannot be litigated in the suit for the compromise amount. Longridge *v.* Dorville;[5] Stewart *v.* Ahrenfeldt;[6] Feeter *v.* Weber;[7] Barlow *v.* Ocean Ins. Co.;[8] Grandin *v.* Grandin;[9] Prout *v.* Pittsfield Fire District.[10] What substantial difference is there between forbearance to further prosecute a suit, and forbearing to commence a suit at all? All the reasons which govern the one apply equally to the other. Still less does that difference seem, when we remember that a compromise, specifically so called, may be made before as well as after a suit has been commenced. Cook *v.* Wright;[11] Easton *v.* Easton;[12] Grandin *v.* Grandin.[13] Is it not a distinction without a difference?

Still more does forbearance to sue resemble a compromise when the agreement is to perpetually forbear, and the promise is to pay therefor a stated sum, without reference to the amount of the claim made. If the mere surrender of an unenforceable claim is a good

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[1] 63 Wis. 387 (1885).
[2] 31 Wis. 111.
[3] 5 Gray, 45.
[4] 55 Vt. 391 (1883).
[5] 5 B. & Al. 117 (1821).
[6] 4 Denio, 189 (1847).
[7] 78 N. Y. 334 (1879).
[8] 4 Met. 270 (1842).
[9] 49 N. J. Law, 508 (1887).
[10] 154 Mass. 453, and cases cited.
[11] 1 B. & S. 559.
[12] 112 Mass. 438.
[13] 46 N. J. Law, 538.

consideration for a new promise, as held in Haigh *v.* Brooks,[1] Wilton *v.* Eaton,[2] Churchill *v.* Bradley,[3] and many other cases; if the formal release under seal of an unfounded claim forms a sufficient consideration for a promise, as so often held; if a covenant under seal never to sue a claim, which is in law not enforceable, is a good consideration, why is not a simple *agreement* to forever forbear to sue a meritorious claim, honestly made, though invalid in law, a good consideration to pay for such forbearance? May we not, therefore, reasonably conclude that a perpetual forbearance to sue a claim honestly and fairly made is a good consideration for a promise to pay for such forbearance, although the suit forborne would have proved unsuccessful?

Edmund H. Bennett.

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[1] 10 Ad. & El. 309; 2 Perry & Dav. 477.
[2] 127 Mass. 174.
[3] 58 Vt. 403.